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JS-6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**DIANA TAIT, ET AL.,
Plaintiffs,**

vs.

**BSH HOME APPLIANCES
CORPORATION,
Defendants.**

Case No.: SACV 10-0711-DOC (ANx)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR ATTORNEY'S FEES
AND REIMBURSEMENT OF
EXPENSES, AND PLAINTIFFS'
REQUEST FOR SERVICE
AWARDS [372]; GRANTING
PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT [373]**

Before the Court is Plaintiffs' Motion for Attorney's Fees and Reimbursement of Expenses, and Plaintiffs' Request for Service Awards ("Motion for Fees") (Dkt. 372) and Plaintiffs' Motion for Final Approval of Class Action Settlement ("Motion for Final Approval") (Dkt. 373). The Court held a hearing on this matter on June 8, 2015. Defendant did not file an opposition to the two motions. The Court received a number of objections to the proposed settlement. After reviewing the moving papers, considering the arguments at the hearing, and reviewing the entirety of the record, the Court GRANTS the Motion for Fees and the Court GRANTS the Motion for Final Approval.

1 **I. Background**

2 **A. Procedural History**

3 On June 3, 2010, Plaintiffs Diana Tait and Nancy Wentworth filed a Complaint against
 4 Defendant BSH Home Appliances Corporation (“BSH”) alleging that certain BSH washing
 5 machines have a propensity to develop a filmy substance referred to as “Biofilm,” bacteria,
 6 mold, fungus, and bioorganic material which produce foul odors (Dkt. 1). On February 14,
 7 2011, Plaintiffs Sharon Cobb, Beverly Gibson, Trish Isabella, Diana Tait and Nancy
 8 Wentworth filed the Consolidated Amended Complaint (“CAC”) (Dkt. 41). BSH moved to
 9 dismiss the CAC (Dkt. 43). In the meantime, the consolidated action was transferred from
 10 Judge Cormac J. Carney to this Court (Dkt. 58). The Court granted BSH’s motion to dismiss
 11 with leave to amend (Dkt. 60), and Plaintiffs filed a Second Consolidated Amended Complaint
 12 (“SCAC”) (Dkt. 66). BSH renewed its motion to dismiss (Dkt. 67), which the Court granted in
 13 part, and denied in part (Dkt. 74). BSH answered the SCAC on September 21, 2011 (Dkt. 75).

14 Plaintiffs moved for certification of four individual state classes comprised of purchasers
 15 of BSH washers in California, Illinois, Maryland, and New York, respectively (Dkt. 87). BSH
 16 opposed the certification motion and moved to strike Plaintiffs’ experts’ opinions (Dkts. 96-
 17 102, 103-104). On December 20, 2012, the Court certified four state classes and denied BSH’s
 18 motion to exclude the opinions of Plaintiffs’ engineering and biology experts (Dkt. 166). *Tait v.*
 19 *BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012).

20 BSH petitioned the Ninth Circuit for permission to appeal the class certification order on
 21 January 3, 2013. At the same time, petitions for certiorari were pending in similar moldy
 22 washer cases against Whirlpool Corporation (“*Whirlpool*”) and Sears, Roebuck & Co.
 23 (“*Kenmore*”) challenging class certification decisions by the Sixth and Seventh Circuits. On
 24 April 1, 2013, the Supreme Court granted certiorari in both *Whirlpool* and *Kenmore*, vacated
 25 the respective circuit opinions, and remanded for reconsideration in light of *Comcast Corp. v.*
 26 *Behrend*, 133 S. Ct. 1426 (2013) (“GVR Orders”). The same day, the Ninth Circuit denied
 27 BSH’s petition for review. BSH filed a motion for reconsideration, which the Ninth Circuit
 28 denied. Following the GVR Orders, the Sixth and Seventh Circuits reaffirmed their earlier

1 decisions, and Whirlpool and Sears once again petitioned for certiorari. Earlier, on July 30,
 2 2013, BSH filed its own petition for a writ of certiorari from the Ninth Circuit's denial of
 3 permission to appeal. The petitions for all three cases were denied on February 24, 2014.

4 Plaintiffs' claims against BSH are on behalf of all United States residents who purchased
 5 one or more Bosch or Siemens brand 27-inch front-loading washing machines. Provisional
 6 Fourth Amended Complaint (Dkt. 370) ¶ 2.¹ Plaintiffs allege that BSH designed, manufactured,
 7 marketed, and sold washers with a propensity to develop bacteria, mold and foul odors
 8 ("BMFO"), and that BSH failed to disclose this defect or the extraordinary tasks required to
 9 abate or ameliorate BMFO. *Id.* ¶¶ 4-7, 44-45. Plaintiffs brought claims against BSH for
 10 violations of state consumer protection statutes, common law fraudulent concealment and
 11 nondisclosure, breach of express and implied warranties, and unjust enrichment. *Id.* ¶¶ 98-207.

12 BSH filed a motion for sanctions related to Plaintiffs' damages experts (Dkt. 232),
 13 which the Court denied on August 20, 2014 (Dkt. 252). Plaintiffs filed a motion for spoliation
 14 sanctions related to discovery issues (Dkt. 265), which was also denied (Dkt. 284).

15 On August 25, 2014, the Court approved Plaintiffs' proposed Notice Plan and draft
 16 forms of notice to the Class (Dkt. 258). Class notice was disseminated to California, Illinois,
 17 Maryland, and New York class members beginning in late September.

18 On August 29, 2014, BSH filed a motion for partial summary judgment (Dkt. 259). Ten
 19 days later, BSH filed a motion to decertify the classes (Dkt. 276). The parties also filed cross-
 20 motions to exclude the opinions of each other's experts ("*Daubert* motions") (Dkts. 289, 335).
 21 At the time of settlement, the partial summary judgment and decertification motions had been
 22 fully briefed and were awaiting hearing and final rulings, and reply briefs for the *Daubert*
 23 motions were days from being filed.

24 Discovery in this matter may fairly be described as extensive and contentious. Plaintiffs
 25 served multiple sets of document requests, interrogatories, and requests for admissions.

26
 27 ¹ Plaintiffs originally alleged claims related to 24-inch washing machines, too, but those claims
 28 were not certified, are not included in the settlement, and will not be released. The operative
 Fourth Amended Consolidated Complaint clarifies that the Class includes only purchasers of the
 27-inch machines.

1 Declaration of Kristen Law Sagafi (“Sagafi Decl.”) (Dkt. 373-1) ¶ 8. BSH produced tens of
 2 thousands of pages of documents, including detailed consumer complaint records and internal
 3 correspondence regarding the design and marketing of the washers. *Id.* The parties took and
 4 defended 28 fact witness depositions, including of BSH marketing, engineering, and consumer
 5 complaint employees and former employees. These depositions took place across the United
 6 States and in the Netherlands. *Id.* The named Plaintiffs were also deposed. *Id.* ¶ 22.

7 The parties presented, collectively, 21 experts who together prepared and served 32
 8 expert reports, including eight disclosed during the class certification stage. The experts
 9 prepared reports related to the washers’ allegedly defective design, mold growth and testing,
 10 consumer complaints, consumer perception of BSH’s marketing and alleged non-disclosures,
 11 and damages. *Id.* ¶ 9. The parties took and defended a total of 26 expert depositions, with some
 12 of the experts being deposed both at the class certification and the merits phases. *Id.*

13 **B. Settlement Negotiations**

14 The parties attended mediation on December 8, 2013, with the Honorable Daniel S. Pratt
 15 (Ret.) serving as mediator. At that time, this case and similar cases against other manufacturers
 16 of front-loading washing machines were facing the possibility of Supreme Court review. The
 17 case did not settle. Sagafi Decl. ¶ 12.

18 Pursuant to the Court’s Scheduling Order dated June 30, 2014, the parties participated in
 19 mediation again, this time with the Honorable Dickran Tevrizian (Ret.), on September 8, 2014.
 20 The parties reached agreement on some significant issues, but did not reach full agreement on
 21 all terms. *Id.* ¶ 13.

22 Following the second mediation, the parties resumed active litigation, including
 23 continued expert work and briefing on BSH’s motion for summary judgment, BSH’s motion to
 24 decertify the class, and *Daubert* motions, along with trial preparation. *Id.* ¶¶ 13-14. On October
 25 21, 2014, the parties resumed negotiations without the assistance of the mediator. The parties
 26 reached agreement on the outstanding issues and executed a memorandum of understanding
 27 (“MOU”) on November 3, 2014. The parties negotiated the amount of attorney’s fees and costs
 28 and service awards for the class representatives only after completing negotiation of the

1 substantive settlement terms. *Id.* ¶ 14; Declaration of Dickran Tevrizian (“Tevrizian Decl.”)
2 (Dkt. 386) ¶ 7.

3 Following the MOU, there were further negotiations over the specifics of the claims
4 process and the notice program, including consultation with the claims administrator, KCC. In
5 parallel with these efforts, class counsel worked diligently to prepare the preliminary approval
6 motion. Sagafi Decl. ¶ 18. On December 12, 2014, the parties fully executed the Settlement
7 Agreement, and that same day, class counsel moved for preliminary approval (Dkt. 363).

8 On December 29, 2014, the Court granted Plaintiffs’ Unopposed Motion for Preliminary
9 Approval (Dkt. 368), preliminarily finding the Settlement to be “fair, reasonable, and
10 adequate,” and “direct[ing] the Claims Administrator and the parties to carry out the Notice
11 Plan as provided for in the Settlement.”

12 **C. Key Terms of the Settlement**

13 The settlement class consists of all residents of the United States who were the original
14 purchasers of one or more Bosch or Siemens brand 27-inch front-loading washers (with certain
15 exclusions). Settlement Agreement (Dkt. 363-1) at 7, § II.G.

16 The settlement is a “claims-made” settlement. Each member of the class is eligible for a
17 \$55 cash payment from BSH. *Id.* § III.A. In order to receive the payment, class members for
18 whom BSH had proof of ownership through its warranty records needed only to confirm their
19 correct mailing addresses and submit a statement under penalty of perjury that they were the
20 original purchaser. Other class members needed to provide proof of ownership through other
21 means (such as a receipt, invoice, credit card statement, or picture of their washer’s serial
22 number) along with a statement under penalty of perjury that they were the original purchaser
23 of the washer. Class members had until May 28, 2015, to submit a claim.

24 BSH agreed not to oppose a request by class counsel for attorney’s fees and costs of \$6.5
25 million, including expert fees and costs. *Id.* at 15, § VI.

26 The settlement provides for a release of liability that will preclude future claims “arising
27 out of, or in any way relating to any act, failure to act, omission, misrepresentation, fact, event,
28 transaction, or occurrence from the beginning of time until the Effective Date of this Settlement

1 Agreement that were raised or could have been raised in the Action relating in any way to
 2 BMFO in the Washers (including the Nationwide Claims), except for claims for personal
 3 injury, emotional distress, or wrongful death.” *Id.* at 17, § VIII.B.

4 Notice of the settlement was provided by mail or email to over 140,000 out of an
 5 estimated 650,000 class members. Notice was also provided through the Internet, including by
 6 the use of Internet banner ads and a settlement website, which is linked to by class counsel’s
 7 websites. Declaration of Eric Robin (“Robin Decl.”) (Dkt. 373-2) ¶ 14; Sagafi Decl. ¶ 19.
 8 Notice was also published in the *Orange County Register* and *People* and *National Geographic*
 9 magazines. Robin Decl. ¶ 11.

10 **II. Legal Standard**

11 **A. Settlement Approval**

12 “The claims, issues, or defenses of a certified class may be settled, voluntarily
 13 dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). Court
 14 approval involves a two-step process: (1) preliminary approval of the settlement; and (2)
 15 following a notice period to the class, final approval of the settlement at a fairness hearing. *See*
 16 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). The
 17 Court may issue final approval of a class settlement “only after a hearing and on finding that it
 18 is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *In re Bluetooth Headset Prods.*
 19 *Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Once the court certifies a settlement class,
 20 approval of the settlement terms rests in the court’s sound discretion. *Class Plaintiffs v. Seattle*,
 21 955 F.2d 1268, 1291 (9th Cir. 1992).

22 “A difficult balancing act almost always confronts a district court tasked with approving
 23 a class action settlement.” *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). On the one
 24 hand, “there is a strong judicial policy that favors settlements, particularly where complex class
 25 action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).
 26 “But on the other hand, ‘settlement class actions present unique due process concerns for absent
 27 class members,’ and the district court has a fiduciary duty to look after the interests of those
 28 absent class members.” *Allen*, 787 F.3d at 1223 (internal citations omitted).

1 Upon appellate review, approval of a settlement’s substantive fairness will rarely be
 2 overturned “unless the terms of the agreement contain convincing indications that . . . self-
 3 interest rather than the class’s interests in fact influenced the outcome of the negotiations.”
 4 *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003). However, district courts in the Ninth
 5 Circuit are held “to a higher *procedural* standard when making that determination of
 6 substantive fairness.” *Allen*, 787 F.3d at 1223. “To survive appellate review, the district court
 7 must show it has explored comprehensively all factors, and must give a reasoned response to all
 8 non-frivolous objections.” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citations
 9 and internal quotation marks omitted).

10 In considering final approval of a proposed settlement, the Court’s discretion is guided
 11 by the following factors:

12 (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and
 13 likely duration of further litigation; (3) the risk of maintaining class action
 14 status throughout the trial; (4) the amount offered in settlement; (5) the
 15 extent of discovery completed and the stage of the proceedings; (6) the
 16 experience and views of counsel; (7) the presence of a governmental
 participant; and (8) the reaction of class members to the proposed
 settlement.

17 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 556, 575 (9th Cir. 2004). “This list is not
 18 exhaustive, and different factors may predominate in different factual contexts.” *Torrisi v.*
 19 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). In addition to these factors, the
 20 Court may consider the procedure by which the parties arrived at the settlement to determine
 21 whether the settlement is truly the product of arm’s length bargaining, rather than the product of
 22 collusion or fraud. *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal.
 23 2010).

24 The Court’s role in evaluating the proposed settlement “must be limited to the extent
 25 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
 26 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as
 27 a whole, is fair, reasonable, and adequate to all concerned.” *Rodriguez v. West Publ’g Corp.*,
 28 563 F.3d 948, 965 (9th Cir. 2009) (internal quotation marks omitted).

1 In general, there is a strong judicial policy favoring class settlements. *Class Plaintiffs*,
 2 955 F.2d at 1276. In evaluating a settlement agreement, it is not the Court's role to second-
 3 guess the agreement's terms. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San*
 4 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). If the settlement cannot be approved as is, the
 5 Court must reject the settlement because it is not authorized "to delete, modify or substitute
 6 certain provisions. The settlement must stand or fall in its entirety." *Hanlon v. Chrysler Corp.*,
 7 150 F.3d 1011, 1026 (9th Cir. 1998) (internal quotation marks omitted).

8 **B. Attorney's Fees and Costs**

9 "In a certified class action, the court may award reasonable attorney's fees and
 10 nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).
 11 "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is
 12 reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at
 13 941. "The reasonableness of a fee award must be considered against the backdrop of the
 14 'American Rule,' which provides that courts generally are without discretion to award
 15 attorneys' fees to a prevailing plaintiff unless" an exception applies. *Id.* "The award of
 16 attorneys' fees in a class action settlement is often justified by the common fund or statutory
 17 fee-shifting exceptions to the American Rule, and sometimes both." *Id.*

18 "An award of attorneys' fees incurred in a suit based on state substantive law is
 19 generally governed by state law." *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d
 20 1016, 1024 (9th Cir. 2003). "The task of a federal court in a diversity action is to approximate
 21 state law as closely as possible in order to make sure that the vindication of the state right is
 22 without discrimination because of the federal forum." *Farmers Ins. Exch. v. Law Offices of*
 23 *Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1236 (9th Cir. 2001) (internal quotation marks
 24 omitted); *see also Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009)
 25 ("State law establishes the required showing for attorney's fees in an action in diversity.").

26 **C. Representative Enhancement**

27 "[N]amed plaintiffs, as opposed to designated class members who are not named
 28 plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. It is within

the Court’s discretion to grant such an award. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). These awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. Awards are generally sought after a settlement or verdict has been achieved.” *Rodriguez*, 563 F.3d at 958-59.

III. The Court’s Special Obligation

The proposed settlement contains certain features which the Court finds troubling.

As the Court indicated at the Fairness Hearing, it takes seriously its obligation to independently ensure that the settlement—including the requested attorney’s fees—is fair, reasonable, and adequate. This duty compels the Court to “look for ‘subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations.’” *Allen*, 787 F.3d at 1224. In *Allen*, the Ninth Circuit reiterated three such subtle signs: “(1) ‘when counsel receive a disproportionate distribution of the settlement;’ (2) ‘when the parties negotiate a “clear sailing” arrangement’ (i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant.” *Id.* (quoting *In re Bluetooth*, 654 F.3d at 947). The Court is concerned that each of these factors appears to be present in the proposed settlement.

The proposed settlement is a “claims-made” settlement, which “is a settlement that does not have a fixed settlement fund, but rather provides that the defendant will pay claims of class members who file them, usually up to some fixed ceiling.” 4 William B. Rubenstein et al., *Newberg on Class Actions* (“*Newberg*”) § 13:7 (5th ed.). As to proportionality, courts are split on whether, in claims-made settlements, attorney’s fees should be viewed as a percentage of the total amount available to the class or the smaller amount actually claimed by the class. *See id.* (citing cases). Class counsel argue that fees should be viewed as a percentage of the maximum amount of funds potentially available to the class. They argue that the requested award of \$4,188,981.61 is only 10% of the total “maximum value” of the settlement, which they assert is

1 \$42.25 million—that is, \$35,750,000 (\$55 per class member × 650,000 class members) +
2 \$6,500,000 (\$4,188,981.61 in fees + \$2,311,018.39 in costs). The Court does not agree.

3 The problem with class counsel’s comparison is that it distorts the reality of the *actual*
4 payment that BSH will make to the class. *Allen* supports the view that proportionality should be
5 determined with reference to the actual amount paid to the class. In *Allen*, the settlement
6 created a maximum fund of \$4.5 million and class counsel sought, and was awarded, a fee
7 representing 25% of that amount. *Allen*, 787 F.3d at 1221. However, less than 8% of the class
8 submitted timely claims and thus only a maximum of \$373,675 would be disbursed to the class.
9 *Id.* at 1224 n.4. In reversing, the Ninth Circuit expressed its concern that the fee award
10 exceeded the actual amount that would be paid to the class by a factor of three. *Id.* at 1224.

11 At the Fairness Hearing, class counsel represented that, as of the close of business on
12 June 5, 2015, 19,469 class members, or approximately 3% of the class, submitted claims. Based
13 on that claims rate, BSH will pay a total of \$1,070,795 to class members—assuming all claims
14 are determined to be valid. The amount of requested attorney’s fees (\$4,188,981.61) is
15 approximately four times the maximum amount that will actually be paid to the class. Thus, the
16 same proportionality concern identified in *Allen* is present here.

17 The proposed settlement also contains a “clear sailing” provision, whereby BSH agreed
18 not to object to class counsel seeking attorney’s fees and costs of \$6.5 million or less. *See*
19 *Newberg* § 13:7 (combination of a claims-made settlement with a clear sailing provision
20 “makes it appear as if class counsel agreed to a low defendant liability in exchange for an easy
21 fee”).

22 Class counsel argue that the settlement does not provide for a reversion of funds to BSH.
23 Although the claims-made settlement does not contain a reverter provision, “[a] claims-made
24 settlement is . . . the functional equivalent of a common fund settlement where the unclaimed
25 funds revert to the defendant.” *Newberg* § 13:7 (reversionary fund settlements and claims-made
26 settlements “are fully synonymous”).

27 As the *Allen* court stated, the existence of red flags “does not mean the settlement cannot
28 still be fair, reasonable, or adequate.” *Allen*, 787 F.3d at 1224. However, especially in light of

1 the troubling features of the proposed settlement, the Court has “a special obligat[ion] to assure
2 itself” that the settlement is fair, reasonable, and adequate and “that the fees awarded in the
3 agreement [are] not unreasonably high.” *Id.* (internal quotation marks omitted; first alteration in
4 original).

5 With this special obligation in mind, the Court proceeds to address the adequacy of the
6 settlement.

7 **IV. Adequacy of Settlement**

8 The Court assesses the adequacy of the settlement in light of the *Churchill Village*
9 factors. *See Churchill Vill.*, 361 F.3d at 575.

10 **A. Strength of Plaintiffs’ Case**

11 Most of Plaintiffs’ claims survived a motion to dismiss (Plaintiffs’ express warranty
12 claims under the Uniform Commercial Code and the Song Beverly Act were dismissed without
13 leave to amend). Classes for four states were certified. BSH’s pending summary judgment
14 motion sought to eliminate the claims of a significant subset of the certified classes. BSH also
15 had pending motions to decertify the classes and *Daubert* motions challenging Plaintiffs’
16 experts on damages, defective design, and consumer complaints. These motions presented
17 serious hurdles for Plaintiffs. Additionally, in the *Whirlpool* action, which involved similar
18 claims of front-loading washing machines having a propensity to develop BMFO, a jury trial
19 resulted in a unanimous defense verdict. Although Plaintiffs’ claims were strong enough to
20 survive a motion to dismiss, they had many evidentiary weaknesses.

21 **B. Risk, Expense, Complexity**

22 Even if Plaintiffs could be certain their claims would survive the pending motions and
23 they would obtain a favorable verdict, defending that verdict on appeal would pose its own set
24 of challenges. This case has already been through a round of appeals, and given the procedural
25 history, further appeals can likely be expected if the case were to proceed in active litigation.
26 The value of any judgment would therefore be discounted by the delay the class members
27 would face in actually obtaining that judgment. By contrast, the proposed settlement provides
28 certain, timely, and substantial relief. *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D.

482, 489 (E.D. Cal. 2010) (in weighing the risk of future litigation, “a court may consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation”) (internal quotation marks omitted).

C. Risk of Maintaining Class Action Status

Maintaining class action status itself was significantly at risk. Even as to the certified classes of consumers in California, Illinois, New York, and Maryland, maintaining certification through trial was not guaranteed in light of BSH’s pending decertification motion and the expected appeals of any final class certification order. *Cf. McKenzie v. Fed. Exp. Corp.*, 2012 WL 2930201, at *4 (C.D. Cal. July 2, 2012) (even though class had been certified and defendant’s motion for reconsideration of the certification decision had been denied, third *Churchill Village* factor weighed in favor of final approval because “settlement avoids all possible risk”).

D. Amount Offered in Settlement

The settlement makes all nationwide class members eligible to receive a \$55 cash payment. For comparison, Plaintiffs’ per-washer damages estimates ranged from \$113 to \$396, depending on the methodology employed. Plaintiffs’ only damages model that BSH conceded could be a valid classwide measure—the price elevation model—estimated damages of \$113 per washer. The potential recovery is nearly half of that figure.

Class counsel characterizes the settlement as creating a maximum value of \$35.75 million ($\$55 \times 650,000$ class members). As discussed above, this “maximum value” is somewhat illusory. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (“The \$14.2 million ‘benefit’ to the class members was a fiction . . . Only 30,245 claims were filed, yielding total compensation for the class members of less than \$1 million.”). A case like this one presents challenges to actually notifying all class members and making sure that they all submit claims. It is patently unrealistic to expect that all—or close to all—class members would submit a claim. *See In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405

1 (D. Mass. 2008) (“[I]n . . . a claims-made settlement, the defendant is likely to bear only a
2 fraction of the liability to which it agrees.”).

3 In fact, at the Fairness Hearing, class counsel represented that only 19,469 class
4 members (or approximately 3% of the nationwide class) submitted claims. Assuming each of
5 these claims are determined valid and paid, the total payout to the class will only be
6 \$1,070,795. This economic reality should be taken into account when assessing the adequacy of
7 the settlement. *See Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 267
8 (E.D.N.Y. 2009) (“[T]he settlement should be valued on the basis of the number of claims that
9 were made against it[.]”); Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for*
10 *Judges* at 13 (3d ed. 2010) (advising courts reviewing settlements to obtain information about
11 “the number of claims actually filed by class members” and “the amount of the settlement that
12 is likely to be distributed to class members”); *see id.* at 16 (“Your appraisal of the settlement
13 should focus on the value actually distributed to the class—based on the number and
14 percentage of class members who have filed a claim.”); Nicholas M. Pace & William B.
15 Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the*
16 *Availability of Class Action Claims Data* 39 (RAND Institute for Civil Justice 2008) (“As part
17 of demonstrating the amount accorded to the class, the parties should have to estimate the
18 proportion of class members likely to make claims and the likely average amount of such
19 claims. . . . In short, the numbers should be transparent and they should add up.”).

20 Although only 3% of class members submitted claims, all class members—besides the
21 approximately 30 who opted out—are releasing their claims against BSH. Put another way, the
22 proposed settlement buys a release from approximately 650,000 class members for the price of
23 \$1.65 per class member ($\$55 \times 19,469 \text{ claims submitted} \div 650,000 \text{ class members}$). *See*
24 *Pearson*, 772 F.3d at 783-84 (where class members were eligible to receive up to \$12 without
25 proof of purchase and up to \$50 with proof of purchase, the actual payment to class members
26 spread across the entire class was “only 7 cents apiece”). Quantifying the settlement as a
27 function of the actual claims is much more meaningful—and accurate—than class counsel’s
28 version of the “maximum value” of the settlement (\$35.75 million).

1 Nevertheless, the Court recognizes that the \$1.65 figure does not tell the whole story. In
2 the settlement, BSH agreed to pay \$55 for all valid claims made. Although competent and
3 experienced counsel for both sides could not have believed all class members would submit
4 claims, *see In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405 (D. Mass.
5 2008) (stating “attorneys for each side bargain knowing that” in “a claims-made settlement, the
6 defendant is likely to bear only a fraction of the liability to which it agrees”), a claims rate
7 somewhat above 3% was likely a realistic possibility, *see Sylvester v. CIGNA Corp.*, 369 F.
8 Supp. 2d 34, 52 (D. Me. 2005) (“‘[C]laims made’ settlements regularly yield response rates of
9 10 percent or less.”). BSH’s agreement up front to be on the hook for all valid claims is worth
10 something greater than simply the value of the actual payment that will be made to class
11 members.

12 Unlike class counsel, the Court thus cannot call the settlement “an excellent result” for
13 the class. That said, “[t]he fact that a proposed settlement may only amount to a fraction of the
14 potential recovery does not, in and of itself, mean that the proposed settlement is grossly
15 inadequate and should be disapproved.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242
16 (9th Cir. 1998) (internal quotation marks omitted).

17 **E. Extent of Discovery Completed and the Stage of Proceedings**

18 The settlement was reached two months before trial was set to commence and only after
19 extensive fact discovery, expert discovery, and motions practice. The first mediation took place
20 after the four classes were certified and after substantial fact and class-related expert discovery.
21 The second mediation took place nine months later, by which time the parties had conducted
22 additional fact discovery, deposed each other’s experts, and filed opening and responding briefs
23 to BSH’s summary judgment motion. Following the second mediation, the parties resumed
24 active litigation, including trial preparation and ongoing briefing related to summary judgment,
25 BSH’s decertification motion, and *Daubert* challenges.

26 This is certainly a case where both parties had ample time and information to evaluate
27 all aspects of the case, the strength of the factual and legal questions at issue, and the likelihood
28 of prevailing.

1 **F. Experience and Views of Counsel**

2 Counsel on both sides of this case are experienced litigators. Class counsel competently
3 investigated and litigated the factual and legal issues raised in this action, and they
4 wholeheartedly endorse the settlement as fair, reasonable, and adequate. *See* Sagafi Decl. ¶¶ 23-
5 24. In light of the problematic incentives inherent in agreements like the one before the Court,
6 however, the views of counsel are not given significant weight.

7 **G. Presence of a Governmental Participant**

8 There is no governmental participant in this action.

9 **H. Reaction of Members of the Proposed Settlement**

10 All class representatives, who actively participated in this litigation, endorse the
11 settlement. *See* Declaration of Beverly Gibson (Dkt. 372-2); Declaration of Dennis Demereckis
12 (Dkt. 372-3); Declaration of Nancy Wentworth (Dkt. 372-4); Declaration of Trish Isabella
13 (Dkt. 373-5). As of the deadline for objecting to or opting out of the settlement (April 30,
14 2015), the claims administrator received 30 opt-outs (0.005% of the total class).

15 The following class members objected to the adequacy of the settlement: Roger Kerr,
16 Robert and Robin Munoz, Jeffrey Rudy, and Bobby Ameen.² One objector, for example, called
17 the \$55 payment a “miniscule settlement amount . . . in comparison [with] the outlay of funds
18 we were forced to make.” Another objector states that “[t]he \$55.00 settlement seems
19 ridiculous, and sort of a slap in the face.”

20 The flaw with each of the objections to the adequacy of the settlement is that the
21 objectors consider only the amount of their asserted damages and ignore both the costs and
22 risks of litigation.

23 **I. Settlement Procedure**

24 In addition to the factors enumerated in *Churchill Village*, the Court finds it appropriate
25 to consider the procedure by which the parties arrived at the settlement to determine whether

26
27 ² Carole Manuwa initially objected to the claims procedure but later withdrew her objection.
28 Charles Moore submitted an objection because he contends that BSH did nothing wrong.
Because he does not contend that the settlement is inadequate or unfair to the class, the Court
does not address his objection any further.

1 the settlement is truly the product of arm's length bargaining, rather than the product of
2 collusion or fraud. *See Chun-Hoon*, 716 F. Supp. 2d at 851; *Van Ba Ma v. Covidien Holding,*
3 *Inc.*, 2014 WL 2472316, at *2 (C.D. Cal. May 30, 2014).

4 The parties engaged in two mediations with well-respected former judges: the Honorable
5 Daniel S. Pratt (Ret.) and the Honorable Dickran Tevrizian (Ret.). In a declaration in support of
6 final approval of the settlement, Judge Tevrizian stated that "the negotiations were intense,
7 arms-length, non-collusive, and contentious." Tevrizian Decl. ¶ 6.

8 **J. Conclusion**

9 In weighing the factors listed above, the Court cannot agree with class counsel's
10 characterization of the settlement as being an "excellent result for the Class." However,
11 particularly in light of the significant risks Plaintiffs would face going forward in the case, the
12 Court finds that the settlement is fair, adequate, and reasonable. *See Fed. R. Civ. P. 23(e)(2)*.
13 And, although the settlement contains features that are less than ideal, the Court finds that the
14 settlement "is not the product of fraud or overreaching by, or collusion between, the negotiating
15 parties." *See Rodriguez*, 563 F.3d at 965 (internal quotation marks omitted). Rather, the less
16 than remarkable result reflects the serious obstacles to victory Plaintiffs would have faced if the
17 case proceeded.

18 **V. Attorney's Fees**

19 Class counsel seeks to recover attorney's fees of \$4,188,981.61.

20 "In a certified class action, the court may award reasonable attorney's fees and
21 nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).
22 "Because there is no agreement regarding fees, the Court, sitting in diversity adjudicating state
23 law claims, turns to applicable California law." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp.
24 2d 1160, 1169 (C.D. Cal. 2010); *see also Mangold v. California Pub. Utils. Comm'n*, 67 F.3d
25 1470, 1478–79 (9th Cir. 1995) ("The method of calculating a fee is an inherent part of the
26 substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial
27 policy of the state.").
28

1 “Under Cal. Civ. Code § 1780(e), a prevailing plaintiff in an action under the CLRA is
2 entitled to an award of costs and attorneys’ fees.” *Parkinson*, 796 F. Supp. 2d at 1169. A
3 plaintiff is a “prevailing plaintiff” under the CLRA when, because of a judgment or settlement,
4 “he obtain[s] a net monetary recovery or . . . he achieve[s] most or all of what he wanted by
5 filing the action or a combination of the two.” *Kim v. Euromotors W./The Auto Gallery*, 149
6 Cal. App. 4th 170, 181 (2007). Plaintiffs in this case qualify as “prevailing plaintiff[s]” because
7 of the monetary recovery provided by the settlement.

8 **A. Method of Calculating Fees**

9 “Courts recognize two methods for calculating attorney fees in civil class actions: the
10 lodestar/multiplier method and the percentage of recovery method.” *Wershba v. Apple*
11 *Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). Courts have discretion to determine which
12 method of calculation to choose. *See, e.g., In re Bluetooth*, 654 F.3d at 940; *In re Consumer*
13 *Privacy Cases*, 175 Cal. App. 4th 545, 558 (2009) (“It is not an abuse of discretion to choose
14 one method over another as long as the method chosen is applied consistently using percentage
15 figures that accurately reflect the marketplace.”). “Regardless of whether attorneys’ fees are
16 determined using the lodestar method or awarded based on a ‘percentage-of-the-benefit’
17 analysis under the common fund doctrine, [t]he ultimate goal . . . is the award of a ‘reasonable’
18 fee to compensate counsel for their efforts, irrespective of the method of calculation.” *In re*
19 *Consumer Privacy Cases*, 175 Cal. App. 4th at 557-58 (internal quotation marks omitted)
20 (alterations in original). Especially in a class action, “the district court must exercise its inherent
21 authority to assure that the amount and mode of payment of attorneys’ fees are fair and proper.”
22 *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999); *accord Staton*,
23 327 F.3d at 963-64.

24 The Court briefly discusses the rationale behind the two respective methods of
25 calculation before selecting the appropriate method for this case.

26 **1. Lodestar**

27 “Generally, litigants in the United States pay their own attorneys’ fees, regardless of the
28 outcome of the proceedings.” *Staton*, 327 F.3d at 965. However, “in certain cases prevailing

1 parties may recover their attorneys' fees from the opposing side. When a statute provides for
2 such fees, it is termed a 'fee-shifting' statute." *Id.* Under California law, "[i]n so-called 'fee
3 shifting' cases . . . the primary method for establishing the amount of 'reasonable' attorney fees
4 is the lodestar method." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000);
5 *see also Staton*, 327 F.3d at 965 ("Under a fee-shifting statute, the court 'must calculate awards
6 for attorneys' fees using the 'lodestar' method'"); *Apple Computer, Inc. v. Superior*
7 *Court*, 126 Cal. App. 4th 1253, 1270 (2005) (attorney's fees "under a fee-shifting statute are
8 determined using the lodestar method"). The laws of New York, Maryland, and Illinois are in
9 accord. *See Douyon v. NY Med. Health Care, P.C.*, 49 F. Supp. 3d 328, 340 (E.D.N.Y. 2014)
10 (using lodestar method to calculate fees in case brought under New York's consumer protection
11 statute and the Fair Debt Collection Practices Act); *Hyundai Motor Am. v. Alley*, 960 A.2d
12 1257, 1265 (2008) ("In determining an award under Maryland fee-shifting statutes, courts
13 employ the lodestar methodology.") *Demitro v. Gen. Motors Acceptance Corp.*, 388 Ill. App.
14 3d 15, 25 (2009) (affirming award of attorney's fees calculated using lodestar method in case
15 brought under Illinois's Consumer Fraud Act).

16 "[The lodestar] figure is calculated by multiplying the number of hours the prevailing
17 party reasonably expended on the litigation (as supported by adequate documentation) by a
18 reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth*, 654
19 F.3d at 941. "Once the court has fixed the lodestar, it may increase or decrease that amount by
20 applying a positive or negative 'multiplier' to take into account a variety of other factors,
21 including the quality of the representation, the novelty and complexity of the issues, the results
22 obtained, and the contingent risk presented." *Lealao*, 82 Cal. App. 4th at 26.

23 **2. Percentage of Recovery**

24 Another method of calculating reasonable attorney's fees is the percentage-of-recovery
25 approach, which is based on the common fund doctrine. Under this doctrine, "a private
26 plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which
27 others also have a claim is entitled to recover from the fund the costs of his litigation, including
28 attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). "This rule

1 . . . is designed to prevent unjust enrichment by distributing the costs of litigation among those
2 who benefit from the efforts of the litigants and their counsel.” *In re Omnivision Tech., Inc.*,
3 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citing *Paul, Johnson, Alston, & Hunt v. Gaulty*,
4 886 F.2d 268, 271 (9th Cir. 1989)). “Under regular common fund procedure, the parties settle
5 for the total amount of the common fund and shift the fund to the court’s supervision. The
6 plaintiffs’ lawyers then apply to the court for a fee award from the fund.” *Staton*, 327 F.3d at
7 969.

8 In common fund cases, the “benchmark” percentage award is 25 percent of the recovery
9 obtained, with 20 to 30 percent as the usual range. *See, e.g., Vizcaino v. Microsoft Corp.*, 290
10 F.3d 1043, 1047 (9th Cir. 2002). The “benchmark” is the starting point for the analysis, and the
11 ultimate amount must be supported by findings that take into account all of the circumstances
12 of the case, including the result achieved, the risk involved in the litigation, the skill required
13 and quality of work by counsel, the contingent nature of the fee, awards made in similar cases,
14 and the lodestar crosscheck. *Id.* at 1048-50.

15 There are significant benefits to the percentage approach, including consistency with
16 contingency fee calculations in the private market, aligning the lawyers’ interests with
17 achieving the highest award for the class members, and reducing the burden on the courts that a
18 complex lodestar calculation requires. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374-
19 77 (N.D. Cal. 1989).

20 **3. Selection of Method of Calculation**

21 Class counsel argue that the Court should calculate reasonable attorney’s fees using the
22 lodestar method. They spent over 18,000 hours litigating this case and assert a lodestar of
23 \$9,265,612.75. In contrast, if the percentage of recovery method is used, the starting point for
24 determining class counsel’s reasonable fees would likely be around \$300,000 to \$400,000.

25 For three primary reasons, the Court finds it appropriate to calculate reasonable
26 attorney’s fees in this case using the lodestar method.

27 First, Plaintiffs’ consumer protection claims are based on fee-shifting statutes. *See In re*
28 *Bluetooth*, 654 F.3d at 941 (“The ‘lodestar method’ is appropriate in class actions brought

1 under fee-shifting statutes”). California, New York, Illinois, and Maryland—the four
2 states for which classes were previously certified—all have statutes authorizing or requiring fee
3 shifting in favor of the prevailing party. *See* Cal. Civ. Code § 1780(e); N.Y. Gen. Bus. Law
4 § 349(h); 815 Ill. Comp. Stat. Ann. 505/10a; Md. Code Ann., Com. Law § 13-408.

5 Second, this is not a common fund case. Unlike in a common fund settlement, whatever
6 amount of fees is awarded to class counsel, it will not affect the amount going to class
7 members. *See In re Consumer Privacy Cases*, 175 Cal. App. at 557 (“[A] fee award may not be
8 justified solely as a percentage of the recovery when that award will not come from the
9 settlement fund.”).

10 Third, although calculation of the lodestar amount focuses on class counsel’s billing
11 time and billing rate, other factors are considered both in calculating the lodestar and in
12 determining whether to apply a multiplier (negative or positive). *See Kerr v. Screen Extras*
13 *Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (listing several factors). Thus, the amount of
14 recovery to the class will be factored into the determination of class counsel’s reasonable fee.
15 *See Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996) (“The district court was not
16 only free but obligated to consider ‘the results obtained’ by [the plaintiff], or ‘the extent of [his]
17 success,’ in calculating the lodestar figure.” (internal citation omitted)).

18 **B. Calculating Class Counsel’s Lodestar**

19 Plaintiffs’ exhibits show that class counsel spent more than 18,730 hours in this case. At
20 the Fairness Hearing, counsel for BSH represented that the amount of time put in by his firm
21 was “in parallel” with the time spent by class counsel. At the Court’s request, class counsel
22 submitted detailed billing records. From its review of the billing records, the Court finds that, in
23 general, the time and rates billed by class counsel is reasonable. However, the Court has
24 identified a number of problems affecting the reasonableness of hours billed and billing rates
25 for some attorneys/staff.

26 **1. Block Billing**

27 Many of class counsel’s time entries “lump[ed] together multiple tasks, making it
28 impossible to evaluate their reasonableness.” *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962,

971 (D.C. Cir. 2004). Such “block billing makes it more difficult to determine how much time was spent on particular activities.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007). The Court exercises its discretion to reduce block-billed time entries by 20%. *See id.* (approving reduction of block-billed time, but disapproving across-the-board reduction when not all hours were block billed). In total, class counsel block-billed 4,736.6 hours, which amount to \$1,875,194.17. Cutting these entries by 20% results in a reduction of \$375,788.83.

2. Hourly Rate

“In assessing a reasonable hourly rate for the lodestar figure, courts should consider the prevailing market rate in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Rosenfeld v. U.S. Dep’t of Justice*, 903 F. Supp. 2d 859, 877 (N.D. Cal. 2012) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984)). “Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Class counsel, as the fee applicant, bear the burden of “produc[ing] satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum*, 465 U.S. at 896 n.11.

The billing rates of the attorneys and staff who worked on this case varied as follows: \$490 to \$995 per hour for partners; \$300 to \$800 per hour for associates; and \$130 to \$425 for paralegals and administrative staff. The Court finds that some of the rates billed by individual attorneys are unreasonably high. In calculating class counsel’s lodestar, the Court reduces the billing rate of partner time to a maximum of \$800 per hour, associate time to a maximum of \$550 per hour, and paralegal time to a maximum of \$225 per hour. *See Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *11 (C.D. Cal. May 6, 2014) (approving rates up to \$750

1 per hour for partners, \$550 per hour for associates, and \$225 per hour for paralegals). This
2 adjustment to class counsel's billing rates reduces their asserted lodestar by \$290,726.50.

3 Additionally, in some instances, the stated billing rate was unreasonable in light of the
4 task performed. For example, class counsel billed at a partner's rate of \$710 to \$950 per hour
5 for tasks such as: "prepare judge's courtesy copies [of court filing]"; "search offsite storage
6 files for Castillo depo transcript"; "scan Castillo Deposition transcript and errata and email to
7 co-counsel"; "arrange interpreter [for deposition]"; "schedule inspections"; "Administration of
8 the case"; and "Administrate bills and expenses." The Court reduces the rate for these and other
9 similar tasks to either an associate or paralegal rate, depending on the task, resulting in a net
10 reduction of \$62,333.50 for all such entries.

11 **3. Overly Vague Entries**

12 Many of class counsel's billing entries were so vague as to prevent the Court from
13 assessing the reasonableness of the time and rate billed. *See Hensley v. Eckerhart*, 461 U.S.
14 424, 433 (1983) ("Where the documentation of hours is inadequate, the district court may
15 reduce the award accordingly."); *Rosenfeld*, 903 F. Supp. 2d at 876 ("The vagueness of certain
16 documents included in Plaintiff's time records make it difficult for this Court to assess whether
17 the time claimed was reasonably spent on this matter."). Examples of such overly vague entries
18 include: "review docs" (several entries); "email" (1.0 hours); "certificate" (1.0 hours); "brief"
19 (6.0 hours); "Review background materials" (8.0 hours); "Expert work" (several entries
20 including one for 10.0 hours); "Conduct document review and analysis" (several all-day entries
21 totaling nearly 500 hours); and "Read and summarize deposition" (several all-day entries
22 totaling 236 hours). These entries are of particular concern to the Court given the large number
23 of hours spent by class counsel in this case. For example, in light of class counsel's fairly
24 detailed billing entries covering thousands of hours devoted to expert-related work, the Court
25 cannot conclude that the additional dozens of hours vaguely described as "expert work" (or
26 something similar) is reasonable. Giving class counsel the benefit of the doubt on these vague
27 entries, the Court cuts them by 50%, resulting in a total reduction of \$206,699.75.

1 The Court also made reductions where the time spent was unreasonable, a task was
2 unnecessarily overstaffed, or the task is not billable. For example, 36.5 hours were billed to
3 summarizing a single deposition. The Court finds this amount unreasonable and cuts it to 16
4 hours. This category includes reductions totaling \$48,334.50.

5 **4. Billing by the Quarter-Hour**

6 One of the law firms, WeissLaw LLP, billed its time in quarter-hour increments.
7 Although that practice is not unreasonable per se, the Court finds it resulted in time counted for
8 hours not reasonably expended on this litigation. Some—but not all—of WeissLaw’s attorneys
9 and staff have several quarter-hour and half-hour entries for tasks, such as reviewing and
10 drafting emails and other correspondence, that likely took only a portion of the time billed. *See*
11 *Welch*, 480 F.3d at 949 (affirming district court’s finding that “hours were inflated because
12 counsel billed a minimum of 15 minutes for numerous phone calls and e-mails that likely took
13 a fraction of the time”). The majority of the billing entries of attorney Joseph H. Weiss and
14 paralegal LaDonna R. McDuffie are quarter-hour or half-hour tasks and the Court reduces their
15 billed time by 20%. *See id.* (affirming across-the-board reduction of hours billed in quarter-
16 hour increments). Attorneys Jordan L. Lurie and Leigh A. Parker also had several such
17 entries—although not a majority—and the Court reduces their billed time by 10%. The Court
18 does not reduce the hours of the other WeissLaw attorneys due to quarter-hour billing. In total,
19 the Court’s reduction for quarter-hour billing is \$50,549.65.

20 Based on the Court’s review of class counsel’s billing records, and making the
21 reductions discussed above, it calculates class counsel’s lodestar at \$8,498,409.02.

22 **C. Adjustment to Lodestar**

23 Having calculated the lodestar, the Court now considers whether to increase or decrease
24 that amount by applying a positive or negative multiplier in light of other factors, particularly
25 the results obtained. *Lealao*, 82 Cal. App. 4th at 26; *Charlebois v. Angels Baseball LP*, 993 F.
26 Supp. 2d 1109, 1115-16 (C.D. Cal. 2012) (“Adjustments to this presumptively reasonable
27 amount may then be made based upon the factors set forth in *Kerr v. Screen Extras Guild, Inc.*,
28

1 526 F.2d 67, 69-70 (9th Cir. 1975) to the extent that those factors are not reflected in the
2 lodestar calculation.”).

3 “[W]here the plaintiff has achieved ‘only limited success,’ counting *all* hours expended
4 on the litigation—even those reasonably spent—may produce an ‘excessive amount,’” and
5 courts should “‘instead ‘award only that amount of fees that is reasonable in relation to the
6 results obtained.’” *In re Bluetooth*, 654 F.3d at 942 (quoting *Hensley*, 461 U.S. at 436, 440); *see*
7 *also McCown v. City of Fontana*, 565 F.3d 1097, 1101-02 (9th Cir. 2009) (“The reasonableness
8 of the fee is determined primarily by reference to the level of success achieved by the
9 plaintiff.”). One way of taking into account the results achieved is by cross checking the
10 reasonableness of a fee with the percentage of recovery method. *Lealao*, 82 Cal. App. 4th at 50;
11 *see also In re Bluetooth*, 654 F.3d at 944 (“[E]ven though the lodestar method may be a
12 perfectly appropriate method of fee calculation, we have also encouraged courts to guard
13 against an unreasonable result by cross-checking their calculations against a second method.”).

14 Here, the maximum *actual* payment that will be made to class members is \$1,070,795,
15 or approximately \$1.65 per class member. As discussed above, this result for the class—though
16 not remarkable—is not unreasonable in light of the significant risk of Plaintiffs losing their case
17 altogether. However, in determining the reasonableness of class counsel’s fee, the maximum
18 actual payment to the class undermines to a degree the reasonableness of the total amount of
19 time spent by class counsel litigating this case. If this case is truly worth only \$1,070,795.00, or
20 approximately \$1.65 per class member, is it reasonable for class counsel to have spent over
21 18,000 hours (amounting to a claimed lodestar of \$9,532,841.75)? Probably not. *See Redman v.*
22 *RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (“[A]ttorneys’ fees don’t ride an escalator
23 called risk into the financial stratosphere. Some cases should not be brought, because the
24 litigation costs will exceed the stakes, and others are such long shots that prudent counsel will
25 cut his expenditure in litigating them of time, effort, and money to the bone.”).

26 Using the percentage of recovery method as a cross check, it is clear the unadjusted
27 lodestar dwarfs the class’s recovery, suggesting a negative multiplier is appropriate. The only
28 question is how much of a negative multiplier.

1 Here, class counsel's lodestar with no multiplier (\$8,498,409.02) is a whopping 7.8
2 times the maximum amount that will be going to class members \$1,090,795.00 (class payment
3 plus incentive awards. *See Pearson*, 772 F.3d at 781 (rejecting the requested fees because they
4 were "an outlandish 69 percent" of the aggregate value). Class counsel—no doubt aware that
5 their lodestar would dwarf the amount of actual recovery to class members—were wise to
6 request a fee amounting to a significant reduction of their lodestar. Class counsel request a fee
7 of \$4,188,981.61, or a negative multiplier of approximately 0.5 of the unadjusted lodestar. The
8 requested fees are 3.8 times the amount going to the class.

9 The Seventh Circuit recently suggested that "in consumer class actions, where the
10 percentage of class members who file claims is often quite low . . . the presumption should . . .
11 be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of
12 the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782
13 (citation omitted). Although the Ninth Circuit has stated that "the benefit obtained for the class"
14 is "[f]oremost among the[] considerations" relevant to an upward or downward adjustment of
15 the lodestar, *In re Bluetooth*, 654 F.3d at 941-42, it has not set a mandatory not-to-exceed
16 percentage when using the percentage of recovery method as a cross check.

17 The amount of fees requested by class counsel likely could not be justified under a
18 percentage of recovery calculation. However, "[b]ecause," in a fee-shifting case, "the lodestar
19 award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially
20 beneficial litigation (as legislatively identified by the statutory fee shifting provision) an
21 adequate fee irrespective of the monetary value of the final relief achieved for the class." *In re*
22 *Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 821 (3d Cir.
23 1995).

24 The Court believes the requested fee of \$4,188,981.61, which is a negative multiplier of
25 approximately 0.5 of the unadjusted lodestar, adequately takes into account the results achieved
26 for the class. In light of the circumstances of this case—which can fairly be described as hotly
27 contested litigation, spanning over five years, including an appeal in the Ninth Circuit and
28

petition for review in the Supreme Court—as well as the policy underlying fee-shifting statutes, the Court finds the requested amount of attorney’s fees (\$4,188,981.61) is reasonable.

D. Objections to Attorney’s Fees

Some of the objectors argue the requested attorney’s fees are unreasonable. The thrust of these arguments are that the reasonableness of the fees should be determined by comparison to the actual amount that will be paid to class members (that is, \$1,070,795 based on a 3% claims rate), not to the “fictional” figure of \$35,750,000 that assumes a 100% claims rate. Objector Bobby Ameen argues the fee is unreasonable if it is more than 40% of the actual payout to the class. As discussed above, the Court agrees with the contention that the actual payout to the class must be considered in determining reasonable attorney’s fees. However, comparing the requested fee to the actual payout does not necessarily lead to the conclusion that the requested fee is unreasonable. As discussed above, the Court finds it appropriate to calculate fees using the lodestar method with a percentage of recovery cross check.

The Court thus overrules the objections, and GRANTS the motion as to attorney’s fees.

VI. Legal Costs

Class counsel also request costs of \$2,311,018.39. The vast majority of these expenses was incurred through expert opinions and testimony. The balance of the expenses includes court fees, discovery costs, travel costs, copying costs, mailing costs, and so forth. In light of the length of this litigation, the importance of expert testimony, and the number of experts on both sides (a total of 21), the Court finds these costs reasonably incurred and GRANTS the motion as to costs.

VII. Class Representative Award

Class counsel also request an award to the class representatives of \$5,000 each (a total of \$20,000).

It is common in class action cases to provide incentive awards to named plaintiffs. *See Newberg* § 11:38 (4th ed. 2008).

Over the course of this lengthy litigation, the named plaintiffs each participated in day-long depositions, made their washers available for inspections, participated in day-long

1 inspections of their homes, and answered discovery. BSH agreed to pay these incentive awards
2 and such payment will not diminish the payment to be made to other class members. The Court
3 finds that the enhancement awards requested in this case are reasonable and appropriate. *See In*
4 *re Toys R Us-Delaware, Inc —Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295
5 F.R.D. 438, 472 (C.D. Cal. 2014) (approving \$5,000 incentive award); *Faigman v. AT & T*
6 *Mobility LLC*, No. C06–04622 MHP, 2011 WL 672648, *5 (N.D. Cal. Feb. 16, 2011)
7 (approving incentive payment of \$3,333.33 and noting that “[i]n [the Northern] [D]istrict,
8 incentive payments of \$5,000 are presumptively reasonable”).

9 The Court therefore GRANTS the request for incentive awards of \$5,000 for lead
10 plaintiffs Dennis Demereckis, Beverly Gibson, Trish Isabella, and Nancy Wentworth.

11 **VIII. Disposition**

12 The Court GRANTS the Motion for Final Approval (Dkt. 373). The objections to the
13 settlement are overruled.

14 The Court GRANTS the Motion for Fees (Dkt. 372), and awards class counsel
15 attorney’s fees of \$4,188,981.61 and reimbursement of costs totaling \$2,311,018.39. The
16 objections to class counsel’s fees are overruled. The Court approves awards of \$5,000 for each
17 of the four lead plaintiffs Dennis Demereckis, Beverly Gibson, Trish Isabella, and Nancy
18 Wentworth.

19
20 DATED: July 27, 2015

21
22 

23 DAVID O. CARTER
24 UNITED STATES DISTRICT JUDGE
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28